



Control Number: 51415



Item Number: 472

Addendum StartPage: 0

RECEIVED
2021 MAY 13 PM 2:20

APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**EASTMAN CHEMICAL COMPANY'S MOTION TO COMPEL DISCOVERY
RESPONSES FROM SOUTHWESTERN ELECTRIC POWER COMPANY**

Eastman Chemical Company ("Eastman") hereby files its Motion to Compel Response to its Request for Information ("RFI") No. 2-3 to Southwestern Electric Power Company ("SWEPCO"), pursuant to PUC Procedural Rule 22.144(e).

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On April 23, 2021, SWEPCO filed the rebuttal testimony of Charles J. Locke in this docket. On May 4, 2021, Eastman served its Second Set of RFIs on SWEPCO. On May 10, 2021, SWEPCO filed its objections to Eastman RFI No. 2-3. This motion is timely filed.

II. LEGAL STANDARDS

The Administrative Law Judges ("ALJs") are well aware of the scope of discovery: A party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action,¹ and may obtain discovery of information that is reasonably calculated to lead to the discovery of admissible evidence.² The scope of discovery is broader than the "relevance" standard under the Texas Rules of Evidence. "Relevant evidence" means information having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.³ But for purposes of discovery, a party may discover the existence, description, nature, custody,

¹ Texas Rules of Civil Procedure ("TEX. R. CIV. P.") Rule 192.3, and 16 TEX. ADMIN. CODE § 22.141(a).

² *Id.*

³ TEX. EVID. R. 401.

472

condition, location, and contents of documents and tangible things that constitute or contain matters relevant to the subject matter of the action to “allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.”⁴ “It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”⁵ Moreover, denial of discovery is improper unless there exists “no possible relevant, discoverable testimony, facts, or material to support or lead to the evidence” that would support a claim or defense at issue in a case.⁶

III. MOTION TO COMPEL

While there are many statements that SWEPCO witness Locke makes in his rebuttal testimony to which Eastman disagrees, the following Q and A is the proffered statement that is the subject of Eastman’s discovery in RFI 2-3. Mr. Locke’s rebuttal testimony states:

Q. HAVE ANY NETWORK CUSTOMERS ADJUSTED THEIR NETWORK LOAD REPORTING PRACTICES BASED ON THE EDUCATIONAL INFORMATION PROVIDED TO STAKEHOLDERS AS A RESULT OF THE 2017 SPP SURVEY?

A. Yes. Several entities made adjustments to their load reporting practices.⁷

The purported purpose of this fact statement is to support SWEPCO’s position that SPP “directed” SWEPCO (a Network Customer) and other Network Customers to start reporting gross load of retail BTMG in late 2018. Eastman’s position is that SPP did not mandate its Network Customers to report gross loads, and SWEPCO’s decision to start reporting gross loads was a

⁴ TEX. R. CIV. P. 192.3(b); see *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009)(the phrase “relevant to the subject matter” is to be “liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.”)

⁵ TEX. R. CIV. P. 192.3(a).

⁶ *Ford Motor Co. v. Castillo*, 279 S.W.3d at 644.

⁷ Rebuttal Testimony of Charles Locke at 23, lines 6-9.

voluntary decision, for which Eastman should not bear the brunt of that decision by paying approximately \$3.96 million per year in the form of a new Transmission Rate applicable only to Eastman. On one hand, Eastman sees how SWEPCO might arguably use this “fact” to support its position. On the other hand, Mr. Locke’s statement could be used to support Eastman’s position because he stated “several entities” made adjustments; thereby signaling that not all of the Network Customers in SPP adjusted their loading reporting practices and thus supporting Eastman’s position that SPP’s change in policy was not a “directive” or based on interpretation of a tariff. Mr. Locke’s statement is vague enough that Eastman sought facts and information related to this statement (*e.g.*, the basis of his statement) and additional detail so that one could understand the relative “importance” or “unimportance” of his statement that “several” entities made such adjustments. Consequently, Eastman asked the following RFI in relation to that specific answer:

EASTMAN 2-3: Referring to the rebuttal testimony of SWEPCO witness Charles J. Locke, page 23, lines 6-9:

- a. Provide the number of entities that made adjustments to their BTMG load reporting practices relative to the total number of respondents to the 2017 SPP survey.
- b. Explain specifically how each entity changed its load reporting practices.
- c. Provide the date when each of the entities changed its respective reporting practice.
- d. Provide the number of survey respondents that did not make adjustments to their load reporting practices.
- e. Provide all workpapers, written communications, and documents that support your responses to subparts (a) through (d) of this RFI.

SWEPCO objected to RFI 2-3 on the basis that the requested information was not relevant to the “legal” question as to the proper interpretation of the SPP OATT.⁸ SWEPCO suggests that

⁸ SWEPCO’s Objections to Eastman’s Second Set of RFIs at 3.

the information sought would not “clarify or dispute the basis for SWEPCO’s OATT-related transmission charges.”⁹ Eastman wholly disagrees and therein lies the difference between Eastman’s position in the case – SWEPCO voluntarily made this decision – versus SWEPCO’s assertion that it was directed to do so by SPP Staff. Mr. Locke’s testimony opens the door by admitting that not all SPP Network Customers (like SWEPCO) are reporting gross loads (that would include retail BTMG load). Eastman has the right to ascertain the facts supporting Mr. Locke’s statement, which includes obtaining factual information about the relative significance of his statement that “several” Network Customers that made the adjustments (as SWEPCO did) as it relates to SPP’s Network Customers as a whole. Eastman’s questions were not pulled out a hat – they are directly related to getting the underlying facts and information that form the basis of his statement, as well as the relative significance, if any, that should be given to that statement. SWEPCO’s attempt to narrow the issue through its argument that this should just be a legal question is a sharp contrast to the lengthy rebuttal testimonies of Mr. Locke and Richard Ross that go to great lengths with statements purporting to offer facts to support SWEPCO’s claims. Information related to SPP’s “directive” on this issue and the response and/or practice by other Network Customers is relevant as to whether there was, in fact, a “directive” and how other similarly situated Network Customers have responded. Again, the standards applied to the specific questions are liberally construed to enable the parties to know the facts that support a party’s claim. In this instance, SWEPCO proffers a “fact” and Eastman is simply attempting to discover the basis of that statement and the relative significance of that statement.

⁹ *Id.* at 4

And, even if the issue were a “legal” dispute on an interpretation of a tariff, extrinsic facts can be and will be used in the interpretation of that tariff. In this instance, Mr. Locke’s statement that “several entities” changed their reporting is an admission that other entities have not changed their reporting. Thus, the information sought in Eastman 2-3 is intended to provide additional facts and information that may ultimately be relevant to the interpretation of what appears to Eastman to be an ambiguous provision in the tariff.¹⁰

In passing, SWEPCO objects to the requests on the basis that the request is burdensome in asking for “all workpapers, written communications, and documents that support the responses to subparts (a) through (d) of this RFI.”¹¹ SWEPCO does not provide any information or basis for its burdensome” objection to Eastman to enable it to determine if the request is indeed burdensome or whether there is any way to tailor the request. But to be clear, Eastman is only asking for documents related to the responses to the other subparts in the RFI; it is not asking with a broad-brush request for documents related to the SPP Survey or response to the survey. Therefore, SWEPCO’s assertion should not be sustained.¹²

Finally, SWEPCO objects to responding to this information because the responses would include confidential information. Eastman submits that “confidentiality” is not a basis for an objection as to whether the information should be provided. The Protective Order protects any

¹⁰ See, e.g., *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008). See also SWEPCO’s admission that interpretations of a tariff involve questions of law, similar to statutory interpretations. SWEPCO Objections to Eastman Second RFIs at 3, fn. 8 (citing *Roberts Exp. v. Inc. v. Expert Transp., Inc.*, 842 S.W.2d 766, 771 (Tex. App.—Dallas 1992, no writ).

¹¹ Eastman’s RFI No. 2-3(e).

¹² Because SWEPCO has not provided any evidence or even asserted why the request is “burdensome”, Eastman reserves the right to respond to SWEPCO’s response to this Motion to Compel if, for the first time, it proffers some support for its “burdensome” objection.

information that is provided under seal and, as with other confidential information provided to Eastman in this proceeding, Eastman fully intends on abiding by the Order.

IV. CONCLUSION AND PRAYER

Eastman's RFI No. 2-3 to SWEPCO is reasonably calculated to lead to the discovery of admissible evidence and is relevant to this proceeding – particularly as it relates to the credibility and/or significance of Mr. Locke's statement. Eastman respectfully moves to compel SWEPCO to produce responses to the pending request within three days of the issuance of an order granting this motion and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

Eastman Chemical Company
Suzanne Spell
Senior Business Counsel
Eastman Chemical Company
200 South Wilcox Drive
Kingsport, TN 37662
423.229.2802
stspell@eastman.com

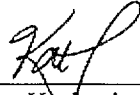
ENOCH KEVER PLLC
Andrew Kever
State Bar No. 11367050
Katherine Mudge
State Bar No. 14617600
Enoch Kever PLLC
7600 N. Capital of Texas Hwy
Building B, Suite 200
Austin, TX 78731
512.615.1200 (phone)
512.615.1198 (facsimile)
akever@enochkever.com
kmudge@enochkever.com

By: 

**ATTORNEYS FOR EASTMAN
CHEMICAL COMPANY**

CERTIFICATE OF SERVICE

I certify that a copy of this document was served by electronic mail, on all parties of record in this proceeding on May 13, 2021, in accordance with the Orders Suspending Rules, issued in Project No. 50664.

A handwritten signature in black ink, appearing to read 'K. Mudge', is written over a horizontal line.

Katherine K. Mudge